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No. 94-1107

In The

Supreme Court of the United States

October Term, 1994

SALEM BLUE COLLAR WORKERS ASSOCIATION AND STEPHEN SCULL,

Petitioners,

v.

THE CITY OF SALEM AND MAYOR AND COMMON COUNCIL OF THE CITY OF SALEM, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the decision of both the District Court and the Court of Appeals that a municipality enacted, fairly applied, continuous post-employment municipal residency requirement, applicable only to direct employees of the municipality, engaged in providing traditionally recognized local governmental services, does not burden a right so fundamental to the national union as to involve a "privilege" or "immunity" protected by Article IV, Section II of the United States Constitution, presents an issue on which this Court should grant a writ of certiorari.

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BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The Petitioners in this matter are the Salem Blue Collar Workers Association (the "Union") which is a labor organization representing clerical and blue collar workers employed by the City of Salem, and Stephen Scull ("Scull") a member of the Union.

The Respondents are the City of Salem[1] and the Mayor and Council Members of its governing body in their personal capacities.

In 1978 the City of Salem adopted Ordinance 78-3 which requires that all employees "hereinafter to be employed" are required to be residents of the City (54a - reference is to Petitioners' Appendix, page 54). There is no allegation by Petitioners of any technical impropriety with respect to the passage of the Ordinance. Furthermore, it is clear that by 1978 it was well settled in New Jersey that municipalities could adopt residency ordinances pursuant to the police power and that state statutes on the subject and the civil service laws did not operate to pre-empt the adoption of such ordinances. *Kennedy v. Newark*, 2 N.J. 178, 184-189, 148 A.2d 473 (1959).

At the time of the adoption of the Salem Residency Ordinance in 1978, most elected and appointed officers of municipalities in New Jersey were required to be residents by virtue of N.J.S.A. 40A:9-1, which was enacted by the New Jersey Legislature in 1971[2]. After the adoption of

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[1] The City of Salem is a small town located in Salem County New Jersey which has a population of approximately 6,883. See 1992 Official Directory of Salem County citing the 1990 U. S. Census.

[2] The 1971 statute did not apply to employees, only "elected and appointed officers". The statute also contained exceptions. It read as follows: "Except in the case of county administrator, counsel, attorney, engineer, health officer, auditor, comptroller, appointed tax collector, elected assessors who have received tenure under P.L. 1967, c. 44. s. 7 (C. 54:1-35.31), appointed tax assessor, or members of boards of assessors or as

the Salem Ordinance, N.J.S.A. 40A:9-1 was repealed by the New Jersey Legislature and replaced with N.J.S.A. 40A:9-1.3 through N.J.S.A. 40A:9-1.10. The new statutory scheme made residency of officers and employees discretionary with the municipality and established certain mandatory provisions to be inserted into municipal residency ordinances adopted after the effective date of the statutes. The new statutory scheme perpetuated all of the original exceptions to the 1971 statute (see N.J.S.A. 40A:9-11) and other exceptions were added by later statutes.

Petitioner Scull was hired as a laborer by the City on November 20, 1989 (29a). The position of "laborer" does not require passage of any civil service merit examination and thus Petitioner Scull did not have to apply for employment through the New Jersey Department of Personnel.[3] Petitioner Scull did however fill out a standard form employment application used by the City in which he stated that he resided in the City of Salem at the time and basically had been a resident all his life, even attending Salem High School.

On January 31, 1992, a letter was written by Kenneth L. Homan, Scull's immediate supervisor, indicating that a

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otherwise provided by law, every person holding an office, the authority and duties of which relate to a county only, or to a municipality only, shall reside within said county or municipality, as the case may be."

[3] This is significant because applicants for employment positions with the City receive notice of its residency requirements from the New Jersey Department of Personnel pursuant to N.J.A.C. 4A:4-2.11(c).

residency ordinance violation was alleged and that Scull should respond within thirty days or termination procedures would begin (29a). Scull immediately filed a grievance with respect to the violation. When the grievance was denied, but before civil service termination procedures were instituted, the Petitioners filed this suit and also filed an unfair practice charge with the New Jersey Public Employment Relations Commission. The City voluntarily joined in a consent order pursuant to which it was temporarily restrained from disciplining Scull for violating the Residency Ordinance until the challenges were resolved (29a).

Although both parties moved before the District Court to dispose of all issues presented in the case by summary judgment, it was acknowledged by both parties that there were some facts in dispute, but that the facts upon which the parties differed were not material, the District Court agreed (30a). The first area of dispute is whether Mr. Scull had actual knowledge of the residency requirement before he moved out of Salem. In his Affidavit filed with the summary judgment motion, Scull implies that he never knew of Salem's residency requirement (JA 173). Mr. Smith, the former City Administrator says in his Affidavit that the Union President revealed during the proceedings on the grievance filed by Scull, that he was approached by Scull who inquired as to the City's residency requirement before he moved out of Salem (JA 183-14).

The City contends that if not actual knowledge, Scull at least had constructive knowledge of the continuing residency requirement. The various Affidavits submitted before the District Court clearly show that the Residency

Ordinance was "common knowledge" amongst the Union members and other employees. A copy of the Ordinance has been posted on the bulletin board in the Salem Municipal Building for years (JA 186-24). Moreover, Mr. Homan, the Supervisor who hired Scull, says that it is his practice to notify all employees at the time of hire of the Residency Ordinance and that he would not have hired Scull if he had not been a Salem resident and did not understand that he must stay a Salem resident (JA 178-2).

The second area of dispute is Petitioners' allegation that the City has taken no steps to enforce its Ordinance since its adoption in 1978, has allowed numerous employees to violate the Ordinance with impunity, and now seeks to enforce its Ordinance only to punish Scull. I believe that this area of contention between the parties is more of a difference on how one chooses to characterize the facts, versus an actual factual dispute.

Consider these facts. The City registered its Ordinance with the New Jersey Department of Personnel as required by N.J.S.A. 40A:9-1.3. Since Salem has adopted the provisions of the New Jersey "Civil Service" code (i.e. N.J.S.A. 11A:1-1 *et seq.*) the Department of Personnel administers merit examinations and compiles the lists of eligible candidates from which the City hires employees. In 1984 the City fired a secretary on the basis of its Residency Ordinance. When the secretary challenged the Ordinance, the City defended and was successful (See Supplemental Certification and Newspaper Article from 1984 attached thereto, JA 188). The City was obviously conscious of its residency requirement in the appointment of its first ever municipal or City Administrator in 1988. Although it could have exempted the Administrator

pursuant to N.J.S.A. 40A:9-136 it chose not to and made that clear to the appointee (JA 182 ¶ 9 & 10)[4]. Prior to the violation by Mr. Scull there is clear evidence that the City had confronted an employee with her alleged violation of the Ordinance. That employee chose to resign, however, if she had not the City would have taken the appropriate steps to terminate her due to the Ordinance violation (JA 182 ¶ 11). When Scull's supervisor brought the violation of the Residency Ordinance to the attention of City Council, the City instructed him to notify Mr. Scull in writing to comply or face termination proceedings (JA 179 ¶ 3).[5]

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[4] Petitioners allege that "the City Administrator overseeing the ordinance" being enforced against Mr. Scull is a Salem Resident (Pb 5, footnote 4). This allegation surfaced for the first time in an Affidavit by the President of Petitioner Union made on January 7, 1993, and filed with the summary judgment motion before the District Court (JA 165 ¶ 15) in order to bolster the Union's claim that the City selectively enforced the Ordinance. Prior to that time neither the Union nor any other person had ever raised this allegation or complained in any way to the Mayor and Council. Upon receiving the January 7, 1993 Affidavit the City Attorney immediately advised both the Mayor and Council, and the City Administrator of the charges in writing. The City Administrator adamantly denied the allegations and made an Affidavit on February 5, 1993 to the contrary (JA 180). Shortly thereafter the City decided to eliminate the position of City Administrator for budgetary reasons, which action effectively terminated the individual holding that position.

[5] The District Court chose to completely ignore all of these facts, stating simply: "Since the ordinance's enactment in 1978, no one has been fired for failure to comply with it" (28a). This was due no doubt to the District Court's intention to accept all Petitioners' allegations as true in granting the City's cross motion for summary judgment.

The City sought no special retribution against Mr. Scull, indeed it offered to allow him six (6) months to comply with the Ordinance. If he had done so the incident would have been forgotten (JA 183 ¶ 14). When Scull refused, and in connection with the Union instituted suit to invalidate the Ordinance, the City resolved to defend its Residency Ordinance against the attack at great expense. Yet it still held open its offer to Mr. Scull if the suit was dismissed by an acceptable voluntary settlement. Moreover the City voluntarily agreed not to fire or otherwise discipline Scull until the challenges to the validity of the Ordinance were resolved (JA 44).

Petitioners' allegation that the City has allowed numerous employees to violate the Ordinance is also a mis-characterization. All officers or employees of the City of Salem who are not residents are within one of the following three classifications: (1) those who were non-resident employees prior to adoption of the Ordinance and thus are "grandfathered"; (2) those who are exempt from the Ordinance by the application of pre-emptive state statutes; or (3) those who, notwithstanding Petitioners' assertions, are not City employees but are employees of autonomous agencies.

The first class is clear enough. It includes those who were employed and were not residents at the time of the adoption of the Ordinance in 1978. This includes for example, Mr. Homan, Petitioner Scull's supervisor.[6]

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[6] Mr. Homan is certainly "grandfathered" because the date of his appointment (1957) precedes the Ordinance and he was a non-resident at the time of adoption and he has continued to be a non-resident (Homan Aff. ¶2). However, it is noted that Mr.

The second class is divided into two subcategories. The first is specific positions exempt by pre-emptive state statutes. These include counsel, attorney, engineer[7], health officer, auditor and comptroller (N.J.S.A. 40A:9-11); police[8] (N.J.S.A. 40A:14-122.1); treasurer (N.J.S.A. 40A:9-1.2); and municipal court judge (N.J.S.A.

Homan would be exempted from the Ordinance as a "health officer" by virtue of N.J.S.A. 40A:9-11. As the Superintendent of a municipal water supply and waste water treatment facility, Mr. Homan must maintain a license issued to him by the New Jersey Department of Health. See N.J.S.A. 26:1A-1 *et seq.* and specifically N.J.A.C. 8:6-1.1.

[7] It is arguable that Salem need not avail itself of the statute in relation to its municipal attorney and engineer. In both instances the City's contract is with a professional service corporation the office of which is located in Salem. It is however admitted that the members of these firms who primarily provide legal and engineering services to the City are not Salem residents.

[8] Although Salem Police Officers, like all other municipal police in New Jersey are exempt from municipal residency requirements pursuant to N.J.S.A. 40A:14-122.1 they are subject to a mandatory continuing requirement of residency within the State of New Jersey by N.J.S.A. 40A:14-122.8; certain age minimums and maximums by N.J.S.A. 40A:14-127; as well as a plethora of other statutory requirements. See generally N.J.S.A. 40A:14-122. It should also be noted that the state statute exempting police officers from municipal residency does not extend to "special police officers" or the "chief of police". Salem has applied its residency requirement to the so called special police officers and to its Chief of Police. It should also be noted that recently Bill A-2053 entitled "Authorizing municipal ordinances requiring residency for new police and firefighters" was sponsored in the New Jersey Assembly. The New Jersey League of Municipalities has issued a statement officially endorsing the Bill. See NJLM Legislative Bulletin, September, 1993.

2A:8-7).[9] The second subcategory involves situations where although the position is not specifically exempt, the interaction between two separate pre-emptive state statutes produces the same result. For example, the City recently appointed a non-resident Construction Code Official. Pursuant to N.J.S.A. 52:27D-126(a) Salem *must* employ a Construction Code Official. Since Salem is a "civil service" jurisdiction and the position of Construction Code Official is a "classified" position, Salem *must* select a candidate from a list of persons eligible for that position as promulgated by the New Jersey Department of Personnel in accordance with N.J.S.A. 11A:1-1 *et seq.* The Department of Personnel will allow Salem to fill the position with a non-resident only if no other residents qualify. In the case of the Construction Code Official that is what occurred. The position became open. The Department of Personnel advertised the positions availability and educational pre-requisites, administered an examination and promulgated a list of eligible candidates from which Salem could fill the position. No Salem residents qualified. The City then appointed the number one candidate on the list. A similar situation arose with respect to

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[9] There are other statutory exemptions such as N.J.S.A. 40A:14-9.1 which prohibits municipal residency requirements for paid firefighters. This statute is cited by Petitioners (Pb 4, footnote 3) however Salem has no paid firefighters. All Salem firefighters are volunteers who are all residents of the town.

the City's Chief Financial Officer[10] (see N.J.S.A. 40A:9-140.10).

The third and final class involves employees whom the Petitioners seek to attribute to the City of Salem but actually are employees of autonomous agencies. These include the teachers and superintendent of schools employed by the Salem Board of Education (a regional institution) and the librarians of the Salem Free Public Library System. Petitioners correctly indicate that N.J.S.A. 18A:26-1.1 prohibits requiring teachers to be residents (Pb 4, footnotes 3 and 4), however that proscription applies to boards of education, not municipalities. The City of Salem employs no teachers, school superintendents or librarians.

Thus although Salem's Ordinance appears to allow the Mayor and Council "to permit any officer or employee of the City of Salem to remain in the employ of the City without complying" with the Ordinance for certain specified reasons, it is submitted that the City has never exercised this reserved power. The few non-resident employees it has are exempt because they fit into one of the three classifications set forth above. No employee has been "informally exempted from the ordinance" as suggested by Petitioners (Pb 4).

Finally, Petitioners' allegation that "most . . . [of Salem's] municipal supervisory personnel" (Pb 4) and

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[10] Petitioners refer to "Salem's Financial Officer" (Pb 4, footnote 3). However, the actual position is "Chief Financial Officer". It is a part time position pursuant to a professional service contract.

policy-makers are exempt from the Residency Ordinance is incorrect. Realistically in a small town such as Salem the positions which one would consider to be "supervisory" or "policymaking" are limited. They would include of course the Mayor and members of the Common Council. In Salem these positions are in fact held by City residents. The City Administrator is a "policymaking" position. Pursuant to N.J.S.A. 40A:9-136, the City could have exempted its Administrator from the residency requirement. Salem decided to apply its residency requirement to its Administrator before it eliminated that position. One might classify the positions of City Clerk, Police Chief, Street Department Superintendent, Tax Assessor, Housing Officer, and Zoning Officer as "supervisory" or "policymaking" positions. These positions carry with them various discretions, responsibilities and independence pursuant to law. In the case of Salem all are residents subject to the City's continuing residency requirement.

REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

This case concerns the applicability of the Privileges and Immunities Clause of Article IV, Section II of the United States Constitution to a municipal ordinance, applicable only to direct employees of the municipality, engaged in providing traditional local governmental services, which require such employees to maintain residency in the municipality during their employment. Petitioners assert that this Court's decision in *United Building & Construction Trades Council of Camden and*

Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208 (1984) mandates application of the Privileges and Immunities Clause to such local residency requirements. It is however clear that the decision does not support Petitioners' assertion, but in fact supports the opposite conclusion as reached by Chief Judge Gerry of the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals. The distinction is clearly evident in the fact that the enactment in question in the *Camden* case burdened private employment while the enactment in this case relates only to direct public employees of the municipality.

The conclusion of both lower courts is consistent with the Clause's purposes of preventing barriers to free trade and commerce between the states and creating a single economic union. As noted by the District Court:

> There are significant differences between a state imposing restrictions on its own workers – as any employer has certain latitude to do – and a state forcing private employers to impose restrictions on their employees. The latter involves governmental restraint on the liberty of the private employers affected, and additionally has a much broader and more comprehensive impact on free trade and commerce between the states. Thus, the type of state regulation of private employment that is typically struck down under the Clause imposes a blanket burden on all persons attempting to pursue a certain livelihood. The Salem ordinance, in contrast, only affects those people seeking employment with one small employer in the state: the City of Salem. When Maryland charges more for a commercial fishing license to out-of-state residents

> than to state residents, anyone from out-of-state wishing to pursue fishing as a livelihood in Maryland is burdened. When, on the other hand, the City of Salem chooses to impose a residency requirement on clerical employees, all out-of-state residents wishing to pursue a livelihood as a secretary in New Jersey are not burdened. Indeed, the vast majority of secretarial jobs in the state remain open to out-of-state residents. Thus, commerce as a whole is not significantly affected . . . we find that application of the Clause in a situation such as this – where the jobs affected represent a negligible percentage of the state's total job market – would be antithetical to the purposes and policies that animate it . . . (41a).

Petitioners have failed to demonstrate that the writ of certiorari should be granted, given the standards set forth in this Court's rule 10.1. The decision of the Court of Appeals in this matter is not in conflict with the decision of another court of appeals of the United States, or any other court, on the same matter. Moreover, contrary to Petitioners' assertions, the decision of the Court of Appeals in this case is not in conflict with this Court's decision in the *Camden* case; it is supported by it.

I SALEM'S MUNICIPAL RESIDENCY ORDINANCE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION

Petitioners' argue that Salem's Residency Ordinance violates the Privileges and Immunities Clause of Article IV, Section II of the United States Constitution (Pb 8).

That Clause provides that "The citizens of each State shall be entitled to all Privileges and Immunities in the several States".

Although municipal residency ordinances have consistently been upheld as against a seemingly endless number of alleged constitutional infirmities there appears to be no specific reference in any of the cases that such ordinances do not offend the Privileges and Immunities Clause. Thus Petitioners endeavor to create a novel argument, without any specific precedent and without any regard to the numerous precedents upholding the constitutionality of such ordinances, that would if accepted invalidate not only Salem's residency ordinance, but all such municipal residency requirements nationwide.[11]

Application of the Privileges and Immunities Clause to a governmental distinction based on residency entails a two-step inquiry. "As an initial matter the Court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause." *United Building & Construction Trades v. Camden*, 465 U.S. 208, 218, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984). Not all forms of discrimination against citizens of other States are constitutionally suspect. *Id.* at 218. Thus this Court has stated:

> It has not been suggested, however, that state citizenship or residency may never be used by a

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[11] The form of government under which Salem is organized leaves the issue of municipal residency to the discretion of the governing body. In some New Jersey municipalities, state statutes now require municipal residency. For example see N.J.S.A. 40A:60-6(b) relating to "boroughs"; and there are others.

> State to distinguish among persons. Some distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally. *Baldwin v. Montana Fish & Game Comm.*, 436 U.S. 371, 383, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978).

Thus as a threshold matter, this Court must determine whether an out-of-state resident's[12] interest in

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[12] Only non-New Jersey residents would have standing to challenge Salem's ordinance under the Privileges and Immunities Clause. New Jersey residents residing outside of Salem have no standing under the Clause; the theory being that they have a chance to remedy the intrastate distinction through the political process while out-of-state residents have no similar opportunity. See *United Building & Constr. Trades v. Camden*, 465 U.S. 208, at 217 citing *Slaughter-House Cases*, 16 Wall 36, 77, 21 L. Ed. 394 (1873). Petitioners allege that the Union has members who "reside outside the State of New Jersey" (See paragraph 3 of Plaintiffs' Complaint JA 9). However, no evidence of this was put before the District Court, other than Petitioners' allegation. The District Court mistakenly resolved the issue of standing in favor of Petitioners, believing that the allegation of out-of-state members contained in the Complaint "remains unchallenged by defendants" (32a). The said allegation in the Complaint was not the subject of an admission in the Answer thereto. See paragraph 3 of the Answer (JA 30). The Third Circuit upheld the District Court's decision in this regard citing to an affidavit of the Union President filed with their summary judgment motion (5a, footnote 1).

employment opportunities with local governments in the process of providing traditional local governmental services "is sufficiently fundamental to the promotion of interstate harmony so as to fall within the purview of the Privileges and Immunities Clause." *United Building & Constr. Trades v. Camden*, 465 U.S. 208, 218, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984) citing *Baldwin* at 436 U.S. 388 and *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553, 560, 64 L. Ed. 713, 40 S. Ct. 402 (1920); and *Blake v. McClung*, 172 U.S. 239, 248, 43 L. Ed. 432, 19 S. Ct. 165 (1898).

This is where Petitioners' novel theory fails. There is no fundamental right to be a municipal government employee which is protected by the Privileges and Immunities Clause.[13] That such a right is not fundamental to

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[13] In Section I of the argument in their Brief, Petitioners spend considerable effort to establish that the Privileges and Immunities Clause of the Constitution is entirely based on the Fourth article of the Articles of Confederation (Pb 10). The District Court and Court of Appeals agreed with this proposition but correctly noted that the said provision in the Articles of Confederation referred to "the privileges of trade and commerce" (34a and 9a). This observation by both lower courts is important, in terms of consistency, with the observation by both courts that the cases that have found employment to be protected by the Clause have generally involved government regulation of private employment. Petitioners simply ignore the clear import of these correct observations and, without any support, state: "The fact that eighteenth century America was characterized by concerns over trade and commerce and public employment was virtually non-existent, by no means evidences that the Privileges and Immunities Clause was intended to protect only certain occupations and not others" (Pb 12). Petitioners further attempt to respond to the observations of the lower courts in this regard by stating that the Articles of Confederation did not "refer to the practice of law, medicine, driving a taxi

interstate harmony is clearly evidenced by the long existence and judicial tolerance of municipal government residency requirements. The rights protected by the Clause are "confined" to those most basic and have been described as follows:

> The inquiry is, what are the privileges and immunities of the citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong to the citizens of all free governments; and which have at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.
>
> What these fundamental principals are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. *Baldwin v. Montana Fish & Game Comm.*, 436 U.S. 371, 385, 56 L. Ed. 2d 354, 98 S. Ct. 1852 (1978).

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cab, or operating as an insurance consultant but the exclusion of nonresidents from these positions or services is equally violative of the Clause" (Pb 12, footnote 3). The obvious infirmity with Petitioners retort is that all of the cited advocations represent endeavors of private trade or commerce and not traditional public employment roles.

In light of the foregoing, one can clearly distinguish a municipal residency preference in filling positions necessary to provide traditional local governmental services from the 1948 South Carolina statute that required non-residents to pay a fee of $2500.00 to shrimp commercially while residents of that state only had to pay $25.00 in *Toomer v. Witsell*, 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948); or the Alaska statute which required that all contracts in connection with the construction of the Alaskan oil and gas pipelines contain a provision requiring the employment of qualified Alaskan residents in preference to non-residents in *Hicklin v. Orbeck*, 437 U. S. 518, 57 L. Ed. 2d 397, 98 S. Ct. 2482 (1978); or the proscriptions against allowing lawyers, insurance agents and other professionals to practice in a state unless such professional was a *bona fide* resident of the state; see *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 84 L. Ed. 2d 205, 105 S. Ct. 1272 (1985).

These decisions and the many others cited by Petitioners center around the creation and protection of "a national economic union" (*Piper* at 470 U.S. 280) based upon a fundamental "privilege" of citizens of one State to do business in another State on terms substantially equal with that State's citizens. There is nothing in *Toomer*, *Hicklin*, or *Piper* which suggests that employment by municipalities engaged in providing traditionally recognized local government services is a protected privilege which is fundamental to interstate harmony, economic or otherwise.

Moreover, the decision in *United Building & Constr. Trades v. Camden*, 465 U.S. 208, 79 L. Ed. 249, 104 S. Ct. 1020 (1984) upon which Petitioners principally rely to

support their novel theory is clearly distinguishable. That case involved a City of Camden Ordinance which required that at least 40% of the employees of private contractors and subcontractors working on City construction projects be Camden residents. The Supreme Court of New Jersey held that the Privileges and Immunities Clause could not be applied to a municipal ordinance as opposed to an enactment of the state, and that the Clause would not apply to a distinction based solely on municipal residency because it was not aimed primarily at out-of-state residents. 88 N.J. 317, 443 A.2d 148 (1982). This Court reviewed and reversed that decision, holding that the Clause does apply to municipal as well as state enactments and that enactments which draw distinctions solely on municipal residency are not immune from the Clause.

Thus the Court went on to analyze whether the Camden ordinance burdened one of those privileges and immunities protected by the Clause. It phrased the issue as follows:

> As a threshold matter, then, we must determine whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently "fundamental" to the promotion of interstate harmony so as to "fall within the purview of the Privileges and Immunities Clause." *Id.* at 218-219.

In deciding that a fundamental right critical to interstate harmony was involved the Court stated:

> The opportunity to seek employment with such *private* employees is sufficiently basic to the

> livelihood of the Nation. *Id.* at 221. (Emphasis added).
>
> Certainly the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. *Id.* at 219.

Thus it is clear that the Court in *United Building & Constr. Trades v. Camden,* was focussing on what it referred to as Camden's "efforts to bias *private* employment decisions in favor of its residents on construction projects funded with public moneys." *Id.* at 221. (Emphasis added.) The Camden ordinance dealt with private employers and employees providing services which are not thought of as traditional governmentally provided services (i.e. construction). This is clearly distinguishable from Salem's Ordinance which deals with direct employees of a public employer seeking to provide services traditionally provided by local governments.

Indeed, this Court in *United Building & Constr. Trades v. Camden,* specifically declined to consider the Camden ordinance as involving *public* employees in its Privileges and Immunities analysis. This Court had done so in *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204, 75 L. Ed. 2d 1, 103 S. Ct. 1042 (1983) which involved a virtually identical enactment as that in the Camden case, however the analysis in *White* was solely under the Commerce Clause and did not involve the Privileges and Immunities Clause.[14] Under the "market participant vs. market regulator" analysis called for by

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[14] Note that this Court in *White* ultimately upheld the public construction residency requirement as against the Commerce Clause challenge.

the Commerce Clause in *White* this Court held that everyone employed on a city public works project is, "in a substantial if informal sense, working for the city". *Id.* at 460 U.S. 211, 75 L. Ed. 2d 1, 103 S. Ct. at 1042. In *United Building & Constr. Trades v. Camden*, the Court specifically declined to treat the employees affected by Camden's ordinance as *public* employees stating:

> *It can certainly be argued that for purposes of the Privileges and Immunities Clause everyone affected by the Camden ordinance is also "working for the city" and, therefore, has no grounds for complaint when the city favors its own residents. But we decline to transfer mechanically into this context an analysis fashioned to fit the Commerce Clause.* Our decision in *White* turned on a distinction between the city acting as a market participant and the city acting as a market regulator. The question whether employees of contractors and subcontractors on public works projects were or were not, in some sense, working for the city was crucial to that analysis. The question had to be answered in order to chart the boundaries of the distinction. But the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. *Id.* at 219-220. (Emphasis added.)

Unlike the facts in *United Building & Constr. Trades v. Camden*, in the case at bar there is no question that all employees affected by the Salem Ordinance are working for the City as *public* employees. Thus as stated by this Court in the above excerpt the Petitioners have "no grounds for complaint when the City favors its own

residents". The rational was alluded to by this Court in the following passage:

> Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause . . . Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with the basic and essential activity . . . *Public employment, however, is qualitatively different from employment in the private sector;* it is a subspecies of the broader opportunity to pursue a common calling. *We have held that there is no fundamental right to government employment* for purposes of the Equal Protection Clause. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (per curiam). *Cf. McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 47 L. Ed. 2d 366, 96 S. Ct. 1154 (1976) (per curiam) (rejecting equal protection challenge to municipal residency requirement for municipal workers.) *Id.* at 219. (Emphasis added.)

Although the decision in *United Building & Constr. Trades v. Camden* is clearly distinguishable from the case at bar since it involved *private* employees, it should nevertheless be noted that this Court did not strike down Camden's ordinance under the Privileges and Immunities Clause. It simply held that the Clause applied to the ordinance. The decision as to whether the ordinance violated the Clause was remanded to the New Jersey Supreme Court, but a decision was never rendered because the case settled.[15] *Id.* at 223. Thus Petitioners

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[15] Indeed this Court seemed to indicate that Camden's ordinance might survive the scrutiny of the Privileges and

have no precedent to support the proposition that even a municipal residency requirement in connection with public construction contracts violates the Privileges and Immunities Clause, much less precedent to support their position that a municipal residency requirement imposed on actual municipal employees providing traditional local government services violates the Clause.[16]

Also relevant to this inquiry are the many cases which have upheld municipal residency ordinances against challenges based upon the "right of interstate travel". *McCarthy v. Philadelphia Civ. Serv. Comm.*, 424 U.S. 645, 647, 96 S. Ct. 1154, 1155, 47 L. Ed. 2d 366 (1976); *Abrahams v. Civ. Serv. Comm.*, 65 N.J. 61, 319 A.2d 483 (1974); *Lines v. City of Topeka*, 223 Kan. 772, 779, 577 P. 2d 42 (1978); *Andre v. Village of Maywood*, 561 F.2d 48, 52-53

Immunities Clause. It distinguished Camden's ordinance from the "Alaska Hire" statute invalidated in *Hicklin, supra*, stating: "we invalidated the [Alaska Hire] Act as an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. No similar "ripple effect" appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects." *Id.* at 223.

[16] Petitioners may attempt to rely on the unpublished opinion in *1st Westco Corp. v. School District of Philadelphia*, under docket no. 91-2727 in the United States District Court for the Eastern District of Pennsylvania (JA 145) and the case of *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super. 376, 437 A.2d 733 (Ch. Div. 1981), *modified* 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982) cited therein; but both of those cases dealt with a law requiring state, not municipal residency and, as such, were not "limited in scope". See preceding footnote.

(7th Cir. 1977); and *Kansas City FOP v. Kansas City*, 620 F. Supp. 752, 755 (D. C. Kan. 1984). For certainly if municipal residency requirements do not interfere with the right of "interstate travel" they do not interfere with "interstate harmony". The two concepts seem related as even the earliest cases interpreting the purpose of the Privileges and Immunities Clause focus on "free ingress into other States, and egress from them . . . " *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357 (1869).

Finally, even if this Court were to reverse the decision of the lower Court and make new law by finding that an out-of-state resident's interest in employment opportunities with local governments in the process of providing traditional local governmental services "is sufficiently fundamental to the promotion of interstate harmony so as to fall within the purview of the Privileges and Immunities Clause",[17] Petitioners' cause must still fail. The second inquiry used by the Courts recognizes

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[17] This is exactly what Petitioners advocate in their Brief. Under Petitioners' theory all municipal residency ordinances would be subject to the Clause and each municipality throughout the country would have to defend its ordinance in a separate fact sensitive court proceeding. Petitioners characterize this result as rational compared to the "artificial distinction" resulting from the decision by both lower Courts that the Clause is inapplicable to traditional municipal residency requirements (Pb 13). Obviously the reverse is true, since the individual residency ordinances of various municipalities throughout the nation share common rationals and methods of implementation. This is particularly true in states like New Jersey where municipal residency ordinances are now facilitated by state enabling statutes which authorize such ordinances and require the ordinance to contain certain mandatory provisions (see N.J.S.A. 40A:9-1.3 to 40A:9-1.10).

that the Clause does not preclude distinctions based on residency where the governing body can demonstrate that "(i), there is a substantial reason for the difference in treatment; (ii) the discrimination practiced against non-residents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284; *United Building & Constr. Trades Council*, 465 U.S. at 222; *Hicklin*, 437 U.S. at 525-526.

This Court has stated that governmental units "should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell, supra*, at 396, 92 L. Ed. 1460, 68 S. Ct. 1156. This caution is particularly appropriate when a governing body is merely setting conditions on the expenditure of funds it controls. See *United Building, supra*, at 221, 79 L. Ed. 2d, at 260.

In *United Building & Constr. Trades v. Camden, supra*, the Court summarized the test as follows:

> The inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. *Id.* at 222.

In the case of Salem's Ordinance, the reasons therefor are stated in its preamble (54a).[18] These reasons have

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[18] Contrary to Petitioners' assertions to the Third Circuit, the City did not fail to "demonstrate a substantial reason" for its Ordinance, nor did it fail to show that the Ordinance "furthers the achievement of [its] objectives". Petitioners assertion that "the City offered no support that its residency ordinance has resulted in actual benefits" is also unwarranted. These are merely Petitioners' characterizations. The District Court made no such findings. The fact is the City came forward with *prima*

sufficed to uphold municipal residency requirement ordinances against constitutional challenges based upon the Fourteenth Amendment which contains the same "privileges and immunities" reference as Article IV, Section II. See *Lorenz v. Logue*, 611 F.2d 421 at 423 (2d Cir. 1979).

Moreover, Petitioners' assertion that Salem's Ordinance is not "closely tailored" to the legitimate ends sought to be achieved is erroneous. The Ordinance requires all officers and employees to be residents and allows for exceptions only when specialized talent; the nature of the employment; or an employee's health is involved. It contained a "grandfather" clause to soften its immediate impact and yet achieve its goals through natural attrition. The fact that unemployed and unskilled residents receive no official preferences in the City's hiring practices is mainly a function of the New Jersey Civil Service merit examination system which governs the City's employment process.

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facia evidence on all these issues in support of the Ordinance, thereby shifting the burden to Petitioners. If the District Court had denied the City summary judgment the City most certainly would have been permitted to retain expert witnesses to conduct studies and analysis to support its arguments at trial.

CONCLUSION

For the foregoing reasons, Respondents contend that the petition for a writ of certiorari should be denied.

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